

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK CARPENTER,

Plaintiff-Appellee,

v

DOLORES SHEPARD, f/k/a DOLORES
CARPENTER,

Defendant-Appellant.

UNPUBLISHED

August 16, 2007

No. 276233

Calhoun Circuit Court

LC No. 00-000860-DM

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant Dolores Shepard appeals as of right the trial court's order modifying the custody, parenting time, and child support sections of the parties' divorce judgment by awarding plaintiff Patrick Carpenter sole physical custody of the parties' two minor children, Chelsea and Conor. The parties continue to share joint legal custody. We affirm.

I. Basic Fact And Procedural History

The parties were divorced on September 15, 2000. The divorce judgment awarded the parties joint legal and physical custody of Chelsea and Conor. Exactly five years after the divorce judgment was entered, Carpenter filed a motion to amend the judgment of divorce, specifically seeking to amend the sections concerning custody, child support, and parenting time. In his motion, Carpenter alleged that the conditions surrounding the children's custody had sufficiently changed such that a modification of custody was warranted. Carpenter largely relied on Shepard's two DUI convictions, her alcohol use, and her "insistence" on driving while unlicensed to support his motion.

In her answer, Shepard admitted that she occasionally uses alcohol and had driven without a driver's license with the children in the vehicle. However, she denied consuming alcohol before driving the children. Shepard alleged that Carpenter's home was filled with "negative gossip" and was "morally unsound in that [Carpenter] allows the children's uncle, who leads an alternative lifestyle, to wield a great amount of influence over the children."

At a hearing on custody and parenting time, Carpenter presented testimony from numerous witness, including his wife, two of Shepard's siblings, the mother of one of Chelsea's friends, and a security guard with whom Shepard had an altercation at a family wedding, to

support his allegations that Shepard abused alcohol, drove the children after she was drinking and, as a result, was not a proper role model for the children. The FOC investigator, Claire Metzger, testified that Shepard only reported one of her two DUI convictions to the FOC, and Metzger later discovered the second on her own. Shepard admitted to Metzger that there was a time when neither she nor her new husband had a valid driver's license due to DUI convictions. Metzger testified that she considered Shepard and her husband alcoholics.

Shepard presented testimony from her psychologist and her parents to rebut Carpenter's allegation that she abused alcohol. Shepard's psychologist testified that Shepard had self-reported a decrease in her use of alcohol, that he did not consider her an alcoholic, and that he had found nothing that would impair her ability to effectively parent. Shepard's parents testified that they had no concerns about Shepard's drinking habits. Shepard also presented witnesses who testified about her involvement in the children's lives.

The hearing referee issued his decision from the bench. The hearing referee first concluded that an established custodial environment existed with both parents. Turning to the Child Custody Act's best interests factors,¹ after finding that the majority of the factors weighed in favor of Carpenter, the hearing referee concluded that Carpenter "met his burden and has established by clear and convincing evidence that it's in the children's, and that is Chelsea and Conor's, best interest to live primarily with their father." Accordingly, the hearing referee found that it was in the children's best interest for the parents to maintain joint legal custody, but that primary physical custody should be with Carpenter. The hearing referee also established parenting time and child support, and barred Shepard from drinking alcohol before or during parenting time.

Shepard filed objections to the hearing referee's findings of fact, arguing that the hearing referee made findings against the great weight of the evidence. She further argued that the factual findings were insufficient for a trial court to review because the hearing referee failed to make any specific findings and, rather, "recited the names of the people whose testimony he considered then said what his conclusions were based on that evidence." Shepard also claimed that the hearing referee was biased against her.

The trial court affirmed the hearing referee's decision to grant Carpenter sole physical custody. As support for its decision, the trial court cited Shepard's drunk driving convictions and continued operation of a motor vehicle after having had her driving privileges revoked. The trial court stated that Shepard's continued use and abuse of alcohol seriously affected her ability to parent her children properly. Turning to the Child Custody Act's best interests factors, the trial court concluded that the evidence weighed in favor of Carpenter and that he sustained his burden of proof by clear and convincing evidence. The trial court agreed that "it would have been helpful to the parties and the Court if the Referee had more specifically indicated the factual basis for his finding as to each of the child custody factors[,] but nevertheless found, "Given the fact that a considerable amount of testimony provided by individual witnesses was issue—or

¹ MCL 722.23.

incident-specific, it was not too difficult to ascertain why the Referee ruled as he did regarding each factor.” The trial court therefore concluded:

The Referee’s failure to articulate more clearly the factual basis for his finding in this case does not require either a remand to him for further findings or a reversal of his finding[s]. As previously stated, this is a *de novo* hearing pursuant to MCL 552.507(6)(a), and this Court’s function is to review the testimony and evidence presented and make its decision. The process utilized by the Court in this case was recently affirmed by the Court of Appeals in the unpublished opinion in *Rolfe v Rolfe*, No. 273000, decided January 16, 2007, which arose from Calhoun County.

This appeal followed.

II. Specific Factual Findings

Shepard argues that she is entitled to a new child custody hearing because the hearing referee failed to make specific factual findings. This Court must affirm all child custody orders unless the trial court’s findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.²

Trial courts are required to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact.³ When a trial court does not make such findings, the proper remedy is to remand for a new child custody hearing.⁴ The trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient.⁵ The trial court also does not have to comment on every matter in evidence or declare acceptance or rejection of every proposition argued.⁶

Shepard argues that the hearing referee did not make specific factual determinations, and, therefore, this Court should remand for a new child custody hearing. Shepard ignores, however, that the trial court conducted a *de novo* review in this case following Shepard’s objections to the hearing referee’s order. As the trial court observed, the testimony was “issue—or incident-specific, [and] it was not too difficult to ascertain why the Referee ruled as he did regarding each factor.” Further, even though the hearing referee’s factual findings were insufficient, the trial court conducted a *de novo* review of the transcripts and made its own factual findings, which are fully supported by specific references to incidents and facts contained in the record and which are fully capable of review.

² MCL 722.28; *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999).

³ *Bowers v Bowers*, 190 Mich App 51, 56; 475 NW2d 394 (1991).

⁴ *Id.*

⁵ MCR 2.517(A)(2); *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994).

⁶ *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005).

The trial court reviewed the transcripts of the eight-day referee hearing and made its own factual findings. At the outset of its opinion, the trial court cited Shepard's DUI convictions, her alcohol abuse, and her driving while her license was revoked to support its decision that Carpenter met his burden of showing that a change in custody was warranted. The record supports all of these factual findings. Shepard herself testified that she had two DUI convictions. There was also ample evidence that Shepard has abused and was still abusing alcohol at the time Carpenter filed the motion to modify custody. Moreover, the trial court's conclusion that Shepard was driving without a license was grounded in the numerous witnesses' testimony that they had seen her drive, including her new husband who testified that she drives herself to work, and Shepard's own admission that she had only recently applied to have her license reinstated.

The trial court went through each of the statutory best interest factors. For each factor that it found in favor of Carpenter, the trial court cited to Shepard's alcohol abuse and her related problems to justify its finding. As discussed above, all of her problems with alcohol were fully documented in the record.

The trial court fulfilled its duty by a thorough review of the child custody hearing and by making reviewable factual findings.⁷ Reversal is unwarranted.

III. Great Weight Of The Evidence

Shepard argues that the hearing referee's decision to award Carpenter sole physical custody was against the great weight of the evidence. Although the trial court need not consider every matter in evidence or every argument raised by the parties in reaching its conclusions, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings.⁸ We give deference to the trial court's assessment of witness credibility.⁹

Because the hearing referee and the trial court determined that the established custodial environment has been with both parents, modification of the established custodial environment of the children required clear and convincing evidence that the change was in the best interest of the children.¹⁰ "To determine the best interests of children in custody cases, the trial court must consider the . . . factors of § 3 of the Child Custody Act" and "explicitly state its findings and conclusions with respect to each of these factors."¹¹

Shepard's great weight of the evidence argument is premised on the fact that, due to the hearing referee's failure to make adequate factual findings, she cannot "argue with specificity which determinations regarding the evidence were erroneous" She does not specifically

⁷ *Bowers, supra* at 56.

⁸ *MacIntyre, supra* at 451-452.

⁹ *Id.* at 459.

¹⁰ MCL 722.27(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005).

¹¹ *Bowers, supra* at 54-55.

challenge any of the statutory best interest factors; rather, she simply contends that there was ample evidence to support her version of the facts.

Admittedly, there was evidence that supported her version of the events; however, there was an equal, if not greater, amount of evidence that supported Carpenter's version of the facts. A finding of fact is against the great weight of the evidence if the evidence "clearly preponderates in the opposite direction."¹² The parties presented contradictory evidence, which forced the hearing referee and the trial court to determine the credibility of the witnesses and their testimony. We defer to the trial court's assessment of credibility and will not second-guess such judgments.¹³ The trial court's finding that Shepard abuses alcohol is amply supported by evidence on the record. Therefore, we conclude that the trial court's decision was not against the great weight of the evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

¹² *Fletcher, supra* at 879 (citation omitted).

¹³ *MacIntyre, supra* at 459.